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Supreme Court, U.S.
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No. 97-606

In The

Supreme Court of the United States

October Term, 1997

MIAMI UNIVERSITY,

Petitioner,

vs.

STATE OF OHIO, *ex rel. The Miami Student,*

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

In the spring of 1995, The Student (the newspaper), the student newspaper of Miami University of Ohio, (Miami) attempted to obtain records of student disciplinary proceedings held before Miami's disciplinary board (UDB). The newspaper was requesting the records in order to compile a database containing statistical information relating to issues of crime and punishment on the Miami campus. The newspaper made clear that Miami's compliance with the request for records need not contain any personally identifiable information, *i.e.* a student's name, social security number or a student identification number. Miami refused to provide the records requested by the newspaper essentially for the purported reason that to do so would violate Miami's obligations under provisions of the Federal Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g). FERPA, among other things, protects the release of "education records" containing personally identifiable information of students. 20 U.S.C. § 1232(g)(b)(2). When Miami failed to provide these records, even subject to the newspaper's clarification that personally identifiable information could be deleted from the records, the newspaper brought an original action in mandamus in the Supreme Court of Ohio pursuant to the Ohio Public Records Act, R.C. 149.43.

On July 9, 1997, the Supreme Court of Ohio ruled on the newspaper's action and granted a writ of mandamus compelling Miami to provide certain of the UDB records requested by the newspaper. 79 Ohio St. 3d 168 (1997). In so ruling, the Supreme Court of Ohio noted that "we believe that we are following the dictates of R.C. 149.43, which is to foster openness and to encourage the free flow of information where it is not prohibited by law." 79 Ohio St. 3d at 172. Accordingly, the Supreme Court of Ohio ordered Miami to disclose to the newspaper records of UDB proceedings that only reflected "the general location of

the incidents, the age and sex of the students (which do not identify the student), the nature of the offense and the type of disciplinary penalty imposed." 79 Ohio St. 3d at 172. The Supreme Court of Ohio did not, however, require Miami to disclose records of the UDB proceedings that contained any personally identifiable information.

On September 19, 1997, Miami filed a motion with the Supreme Court of Ohio seeking a stay of enforcement of that court's order granting the writ of mandamus, and on October 8, 1997 Miami filed its petition for a writ of certiorari in this Court. On October 15, 1997 the Supreme Court of Ohio ordered that the motion for a stay of execution of the writ be denied.

Miami asserts in its petition for certiorari that compliance with the order of the Supreme Court of Ohio granting the writ of mandamus: (1) threatens Miami with the loss of federal funding; (2) contributes to a confusing "patchwork of state court opinions" applying FERPA in the context of state public records requests; and (3) risks violation of the constitutional privacy rights of students. Contrary to Miami's assertions, the decision and order of the Supreme Court of Ohio has not decided any important federal question in a way that conflicts with a decision of any other state court of last resort or of any United States court of appeals; nor does the Supreme Court of Ohio decision raise any important question of federal law that requires resolution by this Court. *Rules of Supreme Court, Part III, Rule 10(b)(c).* Indeed, the decision and order of the Supreme Court of Ohio represents a narrow ruling on a state public records law that carries authoritative weight only among institutions of higher education in the state of Ohio. For these reasons and those discussed in greater detail below, the petition should be denied.

ARGUMENT

I.

THERE IS NO CONFLICT AMONG COURTS

The rules of this Court provide that a petition for a writ of certiorari can be granted where a petition evidences that there exists a clear conflict of opinion among state supreme courts or United States courts of appeal on an important question of federal law. *Rules of Supreme Court, Part III, Rule 10(b)(c).* Miami does not cite to any decision by another state court of last resort or federal court of appeals that conflicts with the decision of the Supreme Court of Ohio. In fact, the only other decision by a state supreme court mentioned in Miami's petition is *Red & Black Publishing Co. v. Board of Regents of University System of Georgia*, 262 Ga. 848, 427 S.E. 2d 257 (1993). In *Red & Black*, the Georgia Supreme Court concluded that FERPA does not bar the release of records of campus disciplinary proceedings. The Georgia Supreme Court determined that records of violation of student rules and regulations are similar to law enforcement records that are specifically exempted from the protection of FERPA. 427 S.E. 2d at 261; 20 U.S.C. § 1232g(a)(4)(6).

Given the paucity of decisions by state courts of last resort applying FERPA in the context of state public record laws, and the total absence of any federal appellate decisions cited by Miami, there is no "patchwork" of opinions requiring this Court's review. The petition should be overruled on this ground.

II.

THE STATE COURT DECISION DOES NOT RAISE ANY IMPORTANT FEDERAL ISSUE OF LAW

A. The Petition Misrepresents The Controversary Giving Rise To The State Court Order.

Miami states in its petition that the newspaper broadly requested "all records kept by Miami University reflecting the disposition of cases of student misconduct by the UDB during the academic years, 1993-94, 1994-95, 1995-96." (Petition, pg. 4.) According to Miami, therefore, the newspaper's demand for public records took no account of any legitimate privacy interests or restrictions, whether imposed by state or federal law, that might attach to the records in question. Miami so characterized the newspaper's request for records as indiscriminate and unconditional in nature in an attempt to bootstrap its argument that the Ohio Supreme Court's order violated FERPA's strictures regarding the release of education records containing personally identifiable information concerning students.

Miami's characterization of the newspaper's demand for records under R.C. 149.43 is entirely misleading. The newspaper's original demand made clear that Miami was not being required to provide any personally identifiable information such as a student's name, social security number, or student identification number. By eliminating its request for public records in that manner, the newspaper was careful to steer a course that avoided any encroachment upon areas of privacy staked out for protection by FERPA.

This misleading characterization by Miami of the newspaper's demand for records is significant because it reveals that Miami's claimed basis for the petition, to wit; the vindication of the privacy interests of FERPA, is disingenuous at best.

B. The Petition Misstates The Position Of The DOE With Respect To The University's Compliance With The Writ.

A review of the petition would leave the reader to believe that Miami is under considerable pressures, exerted by the Department of Education (DOE), not to comply with the order of the Ohio Supreme Court. According to Miami, it is confronted with a "Hobson's choice." As posited by Miami, the university can follow the mandate of FERPA and withhold the documents ordered to be released or it can comply with the order of the Ohio Supreme Court and subject itself to the wrath of the DOE. (Petition, pg. 14.) This argument is founded upon a dilemma that is solely of Miami's making.

Miami is not under any directive or pressure not to comply with the writ. Indeed, the DOE has expressly stated that "Miami may disclose information from the record of the UDB proceedings to The Miami Student, as ordered by the Ohio Supreme Court." According to the DOE, the Ohio Supreme Court's "order does not conflict with FERPA because the court did not order the release of personally identifiable information." (Appendix A at 6a). The DOE clearly recognizes that Miami's compliance with the narrowly drafted order of the state court does not threaten a violation of FERPA or subject Miami to the loss of any federal funding.

C. The Petition Misrepresents The Existence Of An Irreconcilable Conflict Between State And Federal Law.

Miami's petition represents that the decision by the state court threatens the undoing of FERPA, a federal scheme of legislation, which is intended to protect the legitimate privacy interests of students attending institutions of higher education receiving federal assistance. Miami claims that the state court's decision which holds that records of UDB proceedings do not constitute "education records" within the purview of FERPA, "clearly contravenes FERPA's stated purpose — the protection of student's rights to privacy in their educational records." (Petition, pg. 12.)

In actuality, the limited decision of the Supreme Court of Ohio, compelling the release of records that have been broadly redacted so as to delete personally identifiable information, poses no threat to the legitimate privacy interests of any student or to the financial interests of educational institutions receiving federal funding under the aegis of the DOE. Even if Congress intended that the UDB records be considered "education records" for the purposes of FERPA, the newspaper's request for records, as well as the state court's order, necessarily avoided any clash between state and federal law. According to the federal law, an education record may be disclosed without a student's prior written consent when the release of these documents does not disclose personally identifiably information from a student's file. 34 C.F.R. § 99.30(a). In this case, the newspaper did not request, and the state court did not order, the disclosure of any records containing personally identifiable information. 79 Ohio St. 3d at 172. Thus, even if the Ohio Supreme Court misinterpreted FERPA with regard to the definition of "education records," as the Miami claims, that aspect of the state court's decision was not essential to the issuance of the writ. No matter how FERPA is interpreted, Miami's compliance with the writ cannot violate the terms of FERPA because the disclosures ordered by the Ohio Supreme Court will not contain any personally identifiable information.

Moreover, the terms of FERPA specifically contemplate the release of education records pursuant to valid state court orders. FERPA provides that when education records, otherwise protected by the Act, are released by an institution pursuant to a state court order, that institution is exempted from the imposition of any administrative sanctions. 20 U.S.C. § 1232(g)(b)(2)(B); 34 C.F.R. § 99.31(a)(9). The state court decision, therefore, is in complete harmony with the provisions of FERPA. In these circumstances, no actual conflict between state and federal laws will arise if Miami complies with the order of the Ohio Supreme Court.

D. The Petition Fails To Identify The Existence Of An Actual Case And Controversy.

Miami has attempted to prop up its argument in support of the petition on the strength of public records request for UDB records made by organizations that were not parties to this litigation. (Petition, pg. 7, Appendix C.) It is fundamental to our system of jurisprudence that the judicial power of the federal courts is constitutionally restricted to "cases" and "controversies." *Flast v. Cohen*, 392 U.S. 91, 95, 88 S. Ct. 1942, 1949 (1968). The words "cases" and "controversies," are intended to "limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." 392 U.S. at 96, 88 S. Ct. at 1950.

Moreover, the Rules of the Supreme Court limit this Court's review of petitions for certiorari to facts appearing in the record. Supreme Court Rule 26, Paragraph 1. In its Petition, Miami attempts to manufacture a case and controversary by referring to correspondence it received after the Supreme Court of Ohio had granted the writ (*see* Petition, Appendix C). In light of these guiding principles, this Court should not accept jurisdiction in this case to review a narrow state court order vindicating a state public records law on the basis of a theoretical dispute between theoretical litigants that may or may not ever ripen into a matter of federal jurisdiction.

REASONS FOR DENYING THE WRIT

The writ of mandamus issued by the Supreme Court of Ohio compelling Miami to produce various UDB records, that do not contain personally identifiable information, neither threatens nor creates a conflict between federal and state laws. The state court's order constitutes a limited ruling on a request made

strictly pursuant to a state public records law for the production of documents prepared by a state agency. (O.R.C. § 149.43.) Miami's compliance with the ruling of the state court order by Miami will not implicate any federal interest or rights. Indeed, even the DOE, the federal agency charged with administering FERPA, acknowledges that Miami can safely comply with the state court order without running afoul of FERPA. The decision of the Ohio Supreme Court was a proper application of state law. Contrary to the University's argument, denial of the petition will in no way contribute to a "patchwork of state opinions" that will undermine the purposes of FERPA.

Furthermore, Miami's compliance with the order of the Ohio Supreme Court will not impinge upon any constitutional rights of privacy belonging to any student. Whatever the boundaries and contours of the constitutional right of privacy belonging to a student at a public institution of higher education, those boundaries and contours cannot be extended so liberally as to encompass even the disciplinary records of official proceedings of a state agency that contain no more than the age and gender of students, the date, location and nature of incidents and descriptions of any penalties imposed. Thus, given its limited range and scope, the order of the Ohio Supreme Court presents no federal or constitutional issues that call for this Court's review.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A — AFFIDAVIT AND ATTACHMENT OF DR. JAMES C. GARLAND DATED SEPTEMBER 16, 1997

STATE OF OHIO :
: SS
COUNTY OF BUTLER :

I, Dr. James C. Garland, being first duly sworn and cautioned, hereby state as follows:

1. I am the President of Miami University, Oxford, Ohio;

2. In August, 1997, I received a letter from Mr. LeRoy S. Rooker, Director of the Family Policy Compliance Office of the United States Department of Education;

3. A true and accurate copy of that letter is attached hereto as Attachment 1.

Further affiant sayeth naught.

s/ James C. Garland
Dr. James C. Garland

Sworn to before me and subscribed in my presence this 16th day of September, 1997.

s/ D.E. Deahl
Notary Public, Butler County, Ohio
Commission Expires: February 2, 2002

Appendix A

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF MANAGEMENT

AUG 7 1997

Dr. James C. Garland
President
Miami University
200 Roudebush Hall
Oxford, Ohio 45056

Re: *The Miami Student, et al. v. Miami University, et al.*
Supreme Court of Ohio, No. 96-1596

Dear Dr. Garland:

This is in response to the July 21, 1997, letter from Ms. Robin L. Parker, General Counsel, Miami University (Miami or the University). In her letter, Ms. Parker informed the Family Policy Compliance Office (FPCO) in the U.S. Department of Education, as required by 34 CFR § 99.61, that due to the ruling in the above cited case and potential conflict with Ohio law, the University may be unable to comply with the Family Educational Rights and Privacy Act (FERPA). 20 U.S.C. § 1232g; 34 CFR Part 99.

On July 9, 1997, the Supreme Court of Ohio ruled that because University Disciplinary Board (UDB) proceedings are "nonacademic in nature," "university disciplinary records are not 'education records' as defined by FERPA." In her letter, Ms. Parker noted that, as a result of the ruling, under the Ohio Public Record Act, records pertaining to on-campus disciplinary proceedings at Miami and other public universities must be made available for public inspection and copying.

Appendix A

In several phone calls with Department officials, Ms. Parker informed the FPCO that, subsequent to the ruling, *The Chronicle of Higher Education* has requested from the University "copies of records of all disciplinary proceedings handled by the University's internal judicial system for calendar years 1995 and 1996." It is our understanding that the *Chronicle* has made the same request to other public universities in Ohio.[1] In addition, we also understand that the University has received a similar request from the *Cincinnati Enquirer*.

As you are aware, FERPA is a Federal law that protects a student's privacy interest in his or her "education records" and generally prohibits the disclosure of education records, "or personally identifiable information contained therein," without the consent of the student.[2] 20 U.S.C. § 1232g(b)(1). The term "education records" is broadly defined as all records, files, documents and other materials which:

> contain information directly related to a student; and are maintained by the educational agency or institution or by a person acting for such agency or institution.

20 U.S.C. § 1232g(a)(4)(A); *see also* 34 CFR § 99.3 "Education records." FERPA does not list, identify, or single out any particular types of documents as "education records." The only types of student records excluded from the definition of education records are records specifically listed by the statute

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1. The Department is also sending this letter to other public universities who may have received a request from the *Chronicle* or another newspaper.

2. On the elementary and secondary level, the rights afforded by FERPA belong to a student's parents.

such as law enforcement unit records. Thus, records of campus disciplinary proceedings taken against students accused of misconduct, including those of a criminal and non-academic nature, are education records under FERPA because they are directly related to one or more students and are maintained by an educational agency or institution.

FERPA prohibits the nonconsenual disclosure of personally identifiable information derived from education records, except in certain statutorily specified circumstances. 20 U.S.C. § 1232g(b); 34 CFR § 99.31. There are 13 statutory exceptions to the prohibition that personally identifiable information from education records may not be released without consent. However, the FERPA statute does not include an exception for the public disclosure of student disciplinary records. Accordingly, these records may not be disclosed without the prior written consent of the student or students about whom the records relate. 20 U.S.C. § 1232g(b)(1) and (d). *See also* 34 CFR § 99.30.

Once it has been determined that a document constitutes an "education record" (i.e., it contains information directly related to a student and is maintained by the school), that document may not be released without consent of the student, and personally identifiable information may not be extracted from that document and released without consent. "Personally identifiable information" includes, but is not limited to, the following information:

(a) the student's name;

(b) the name of the student's parent or other family member;

(c) the address of the student or the student's family;

(d) a personal identifier, such as the student's social a security number or student number;

(e) a list of personal characteristics that would make the student's identity easily traceable; or

(f) other information that would make the student's identity easily traceable.

34 CFR § 99.3, "Personally Identifiable Information."

FERPA does not specifically define "easily traceable" and whether or not the release of information might be considered easily traceable must be analyzed on a case by case basis. For instance, schools need to ensure that disclosure of information on a particular subgroup, such as race, would not permit the possible identification of individual students when compared with other subgroups. In sum, if a school reasonably believes that a release of information would make the student's identity "easily traceable," then the school should not disclose the information to the requesting party.

Although the Supreme Court of Ohio stated that student disciplinary records are not "education records" protected by FERPA, the Department believes that this ruling is wrong as a matter of law. However, the court did not order the University to disclose information from disciplinary records in personally identifiable form.[3] Instead, the court stated:

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3. Under FERPA, information from an education record may be disclosed without the student's prior written consent pursuant to a lawfully

(Cont'd)

Appendix A

> . . . , in accordance with relator's request, Miami University may delete from the UDB records the student's name, Social Security Number, and student identification number. The exact date and time of the alleged incident may also be deleted, since this constitutes other information that may lead to the identity of the student. The university must disclose, however, the general location of the incident, the age and sex of the student (which does not identify the student), the nature of the offense, and the type of disciplinary penalty imposed.

In our view, this order does not conflict with FERPA because the court did not order the release of personally identifiable information from the disciplinary records. We therefore remind the University of its obligations to comply with FERPA's requirements. Thus, you may comply with court's ruling without violating FERPA as long as personally identifiable information (including information that you believe to be easily traceable to a student) is not disclosed from education records. If a requestor such as the *Chronicle of Higher Education* or the *Cincinnati Enquirer* insists that the University provide information in personally identifiable form and the University intends to comply with the request, we ask that you contact the Department immediately.

(Cont'd)
issued subpoena or court order. 20 U.S.C. § 1232g(b)(2)(B); 34 CFR § 99.31(a)(9). Accordingly, Miami University may disclose information from the records of the UDB proceedings to *The Miami Student*, as ordered by the Ohio Supreme Court. Because the order does not require the release of personally identifiable information from the student's records, the University does not have to make a "reasonable effort to notify" the student as provided for in 34 CFR § 99.31(a)(9)(ii).

Further, we suggest that this potential conflict between FERPA and Ohio law should be brought to the attention of appropriate State officials as soon as possible. The Department will, of course, offer any help we can in assisting State officials. For this reason, we are sending a copy of this letter to Governor Voinovich and Attorney General Montgomery. Please do not hesitate to contact the FPCO at the address listed below if you have any questions on FERPA or if we can provide additional assistance:

Family Policy Compliance Office
U.S. Department of Education
600 Independence Avenue, SW
Washington, DC 20202-4605
(202) 260-3887

Sincerely,

s/ LeRoy S. Rooker
LeRoy S. Rooker
Director
Family Policy Compliance Office

cc: Honorable George Voinovich
Governor

Honorable Betty D. Montgomery
Attorney General

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Appendix A

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Appendix A

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